(13)

Supreme Court, U.S.
FILED
NOV 3 1 2005
OFFICE OF THE CLERK

No. 04-1324

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 30, 2005
CERTIORARI GRANTED SEPTEMBER 27, 2005

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Opinion of the United States Court of Appeals for the Eleventh Circuit, dated November 29, 2004 ..... 1a

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IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT, IN AND FOR
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CRIMINAL DIVISION
CASE NO. 97-4411

PATRICK DAY,

Defendant.

RELEVANT DOCKET ENTRIES

10/08/97	4	Affidavit for: Murder 2nd Degree, Ret. 10-24-97. Original arrest date for 2nd degree murder was 10/3/97. Date offense occurred: 02271996.
04/07/98	50	Indictment filed.
04/09/98	55	Initial appearance for: Homicide 1st Degree.
08/31/98	133	Jury trial began, but not concluded.
09/03/98	164	Found guilty: Ct. 1, 2nd degree murder (LIO)
10/14/98	193	Defendant sentenced on upward departure due to conduct and measures taken after commission of crime to cover up victims death, and defendants prior convictions.
10/14/98	199	Judgment and sentence filed.

11/02/98	210	Notice of appeal filed.
01/07/00	232	Filed mandate & opinion from district court affirming the judgment and sentence of this court.
03/13/01	238	Motion for post conviction relief filed pro se.
02/26/02	244	Judge: Geeker, Filed order denying defendant's motion for post conviction relief.
02/28/02	247	Motion for post conviction relief filed – amended – pro se and memorandum of law in support of amended motion for post conviction relief.
03/14/02	250	Judge: Geeker, Filed order denying defendant's second motion for post conviction relief.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PATRICK A. DAY,

Appellant,

v.

CASE NO. 1998-4141
CASE NO. 1D02-1271

STATE OF FLORIDA,

Appellee.

RELEVANT DOCKET ENTRIES FOR NO. 1998-4141*

11/09/98	Notice of Appeal Filed
05/03/99	Initial Brief on Merits
06/28/99	Appellee's Answer Brief
07/23/99	Appellant's Reply Brief
12/21/99	Affirmed - Authored Opinion (746 So.2d 1219)
01/06/00	Circuit Court Mandate

* This case number was assigned to Day's direct appeal of his sentence.

RELEVANT DOCKET ENTRIES FOR NO. 1D02-1271**

04/01/02	Notice of Appeal Filed
04/04/02	Initial Brief on Merits (filed by Patrick Day)
04/10/02	Notice that state will not file answer brief
10/09/02	Affirmed – Per Curiam Affirmed
10/22/02	Motion for Rehearing (filed by Patrick Day)
11/15/02	Deny Appellant's Motion for Rehearing – 56A
12/03/02	Circuit Court Mandate

** This case number was assigned to Day's appeal of the order denying his motion for post conviction relief.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.

RELEVANT DOCKET ENTRIES

01/13/03	1	PETITION for writ of habeas corpus under 28 U.S.C. 2254 (Entered: 01/14/2003)
01/14/03		CASE REFERRED to Magistrate Judge M Casey Rodgers (Entered: 01/14/2003)
02/04/03	4	ORDER by Magistrate Judge M Casey Rodgers. The clerk shall send copies of this order and the petition to the respondent and the Atty General for the State of FL who shall have 45 days to show cause why the relief requested should not be granted. (sic) setting answer deadline for 3/21/03 for MICHAEL MOORE. (Entered: 02/04/2003)
03/19/03	7	ANSWER to Complaint by respondent MICHAEL MOORE (Attorney: CHARLES RICHEY MCCOY) modified on 3/10/2004

03/21/03	8	ORDER by Magistrate Judge M Casey Rodgers. Petitioner has 20 days to file a reply to the resps answer. Setting response to order deadline Re: to file reply to answer for 4/10/03 for PATRICK DAY (Entered: 03/21/2003)
04/03/03	9	RESPONSE by petitioner PATRICK DAY re: [7-1] answer by MICHAEL MOORE (Entered: 04/04/2003)
06/06/03	10	ORDER by Judge Roger Vinson Referring Case to Magistrate Judge Miles Davis (Entered: 06/09/2003)
12/11/03	11	ORDER TO SHOW CAUSE – Within 20 days of docketing this order, petitioner shall show cause why his federal habeas petition should not be dismissed as untimely. Show Cause Response due by 1/4/2004. Signed by Judge MILES DAVIS on December 11, 2003. (Entered: 12/15/2003)
12/11/03	12	ORDER REASSIGNING CASE. Case reassigned to Judge M CASEY RODGERS for all further proceedings pursuant to administrative order (4:95mc40111). Judge Lacey Collier no longer assigned to case. New judge initials (MCR) should replace LAC in case number on all future documents filed. Signed by Chief Judge ROGER VINSON on 12/11/03. (Entered: 12/16/2003)
12/30/03	13	RESPONSE re 11 Order to Show Cause, by PATRICK DAY. (Entered: 12/30/2003)

01/06/04	14	REPORT AND RECOMMENDATIONS re 1 Petition for Writ of Habeas Corpus – That the petition be DISMISSED and the clerk be directed to close the file. Objections to R&R due by 2/3/2004. Signed by Judge MILES DAVIS on January 6, 2004. (Entered: 01/07/2004)
01/16/04	15	OBJECTION to 14 Report and Recommendations by PATRICK DAY. (Entered: 01/21/2004)
01/21/04	16	ORDER ADOPTING REPORT AND RECOMMENDCATIONS – Re: 14 Report and Recommendations – The petition for writ of habeas corpus (doc. 1) challenging the conviction and sentence in State of Florida v. Patrick A. Day, in the Circuit Court of Escambia County, Florida, case no. 97-4411, is DISMISSED and the clerk is directed to close the file. Signed by Judge M CASEY RODGERS on January 21, 2004. (Entered: 01/22/2004)
02/12/04	17	NOTICE OF APPEAL entitled "Certificate of Appealability" (being construed as notice of appeal) as to 16 Order Adopting Report and Recommendations, by PATRICK DAY. (Certificate of Readiness due by 3/2/2004; Transcript Order Form due by 3/17/2004) (Entered: 02/17/2004)

02/12/04	18	MOTION for Certificate of Appealability (also construed as a notice of appeal, see doc. 17) by PATRICK DAY. (Entered: 02/17/2004)
02/18/04	20	ORDER - Denying 18 Motion for Certificate of Appealability. Signed by Judge M CASEY RODGERS. (Entered: 02/18/2004)
03/08/04	26	Letter/MOTION to Extend Time to file Motion To Appeal In Forma Pauperis by PATRICK DAY. (Entered: 03/10/2004)
03/11/04	28	ORDER – Granting 26 Motion to Extend Time. Petitioner shall submit a completed in forma pauperis application on or before 4/8/2004. Signed by Judge MILES DAVIS. (Entered: 03/12/2004)
03/29/04	32	MOTION for Leave to Appeal in forma pauperis by PATRICK DAY. (Entered: 03/29/2004)
04/02/04	34	ORDER denying 32 Motion for Leave to Appeal in forma pauperis. Signed by Judge M CASEY RODGERS. Petitioner shall pay the $225.00 filing fee within 30 days of the date of this order. (Entered: 04/02/2004)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10778

PATRICK DAY,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

RELEVANT DOCKET ENTRIES

05/03/04	Motion to Proceed IFP: (ProSe)
05/03/04	Motion for Certificate of Appealability: (ProSe)
06/04/04	ORDER: Appellant's motion for certificate of Appealability is GRANTED. Appellant's motion for leave to proceed on appeal in forma pauperis is GRANTED. (CRW)
07/12/04	Appellant Brief Filed: (ProSe)
08/02/04	Appellee Brief Filed: (Atty: Charles R. McCoy)
08/13/04	Reply Brief Filed: (ProSe)
11/29/04	Judgment Entered
11/29/04	Opinion Issued
12/29/04	Mandate Issued

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT, IN AND FOR
ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CRIMINAL DIVISION
CASE NO. 97-4411

PATRICK DAY,

Defendant.

MOTION FOR POST CONVICTION RELIEF

The above named Defendant, pro se, pursuant to Florida Rules of Criminal Procedure 3.850, moves this Honorable Court to vacate, set-aside, or correct the judgment or sentence imposed in the above styled-cause, and would show the following:

1. Name and location that entered the judgment under attack: First Judicial Circuit Court, Pensacola, Escambia County, Florida

2. Date of judgment of conviction: September 3, 1998

3. Length of Sentence: Fifty-Five (55) Years DOC

4. Nature of offense(s) involved (all cases): Second Degree Murder with possession of a Weapon

5. What was your plea? (Check only one)

(a) Not Guilty XXXX
(b) Guilty _____
(c) Nolo Contendere _____
(d) Not Guilty by Reason of Insanity _____

* * * * *

6. Kind of trial: (check only one)

(a) Jury XXXX
(b) Judge only without Jury _____

* * * * *

8. Did you appeal from the judgment of conviction?
Yes XXXX No _____

9. If you did appeal, answer the following:

(a) Name of Court: First District Court of Appeals
(b) Results: Per Curiam Affirmed
(c) Date of Result: January 10, 2000
(d) Citation (If known):

10. Other than a Direct Appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment or sentence in this Court?

Yes _____ No XXXX

* * * * *

12. Other than a Direct Appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other Court?

Yes _____ No XXXX

* * * * *

14. The following grounds are alleged for relief:

(Grounds omitted in printing)

* * * * *

16. Do you have any petition, application, appeal, motion, etc., now pending in any Court, either State or federal, as to the judgment under attack?

Yes ____ No XXXX

* * * * *

WHEREFORE, movant requests that the Court grant all relief that the movant may be entitled in this proceeding, including but not limited to (here list the nature of the relief sought):

1. Remand for Evidentiary Hearing for new trial

* * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion For Post Conviction Relief and Memorandum Of Law has been furnished to Curtis A. Golden State Attorney, M.C. Blanchard Judicial Building, P.O. Box 12726, Pensacola, FL 32575; Ernie Lee Magaha, Clerk of Court, 190 Governmental Center, Pensacola, FL 32501 by U.S. Mail this 9 day of March, 2001.

/s/ Patrick Day

DORM# 01-2050 MAIL# 1031
Gulf Correctional Institution-Annex
699 Ike Steele Road
Wewahitchka, Florida 32465

CERTIFICATE OF NOTARY

STATE OF FLORIDA
COUNTY OF GULF

SWORN AND SUBSCRIBED TO, before me the undersigned authority, this 9 day of March, 2001 personally appeared Patrick A. Day, who first being duly sworn and who produced his inmate identification card saying that he is the defendant, in the above-styled cause, that he has read the foregoing Post Conviction Motion and Memorandum, and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these matters are true and correct.

NOTARY SEAL

/s/ Helen L. Carlsten
NOTARY SIGNATURE

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PATRICK DAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IS FILED.

CASE NO. 1D02-1271

Opinion filed October 9, 2002.

An appeal from the Circuit Court for Escambia County.
Nickolas P. Geeker, Judge

Appellant pro se.

Robert A. Butterworth, Attorney General; Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

MINER, KAHN and WEBSTER, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

November 15, 2002

CASE NO.: 1D02-1271
L.T. No.: 97-4411

Patrick Day	v.	State Of Florida
Appellant / Petitioner(s),		Appellee / Respondent(s).

BY ORDER OF THE COURT:

Appellant's motion filed October 22, 2002, for rehearing is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Served:

Patrick Day

Edward C. Hill, Jr., A.A.G.

Hon. Richard E. Doran, A.G.

jm

/s/ Jon. S. Wheeler
JON S. WHEELER, CLERK

MANDATE

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable Judges of the Circuit Court for Escambia County

WHEREAS, in that certain cause filed in this Court styled:

PATRICK DAY Case No : 1D02-1271

v. Lower Tribunal Case No : 97-4411

STATE OF FLORIDA

The attached opinion was issued on October 9, 2002.

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

WITNESS the Honorable MICHAEL E. ALLEN, Chief Judge of the District Court of Appeal of Florida, First District, and the Seal of said Court done at Tallahassee, Florida, on this 3rd day of December 2002.

/s/ Jon S. Wheeler
JON S. WHEELER, Clerk
District Court of Appeal of Florida,
First District

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.

PROVIDED TO
GULF CI ON
JAN 08 2003
FOR MAILING

FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

NAME: Patrick Day

PRISON NUMBER: P03864

NAME OF PLACE OF CONFINEMENT:
Gulf Correctional Institution

ADDRESS OF PLACE OF CONFINEMENT:
500 Ike Steele Rd., Wewahitchka, FL 32465

* * * * *

PETITION

1. Name and location of court which entered the judgment of conviction under attack and state court case number(s): First Judicial Circuit, Escambia County, Florida

2. Date of judgment of conviction: September 3, 1998

3. Length of sentence: 55 years

* * * * *

9. Did you appeal from the judgment of the conviction? Yes (X) No ( )

10. If you did appeal, answer the following:

(a) Name of court First District Court of Appeal Tallahassee FL

(b) Result Affirmed Case No. 98-4141

(c) Date of result- Dec. 21 1999 / Informed Jan. 6 2000

* * * * *

11. Did you file any postconviction motions under either Florida Rule of Criminal Procedure 3.800 or 3.850 with the state trial court or any other postconviction motions or petitions for writ of habeas corpus with the state trial court or state appellate court to this judgment and conviction? Yes (X) No ( )

12. If you did file any matters within the realm of question 11, answer the following as to each motion or petition. Attach separate pages as needed for each motion or petition filed.

(a) The type of motion/petition filed Motion 3.850

(b) Date motion/petition filed March 9, 2001

(c) Name of court Escambia County Circuit Court

(d) Result Denied

(e) Date of result Feb. 26, 2002

13. If your motion or petition described in paragraph 12 was denied, did you file an appeal of that denial with the appropriate state appellate court? Yes (X) No ( )

As to each motion or petition (attach separate pages as needed) indicate:

(a) Name of court where appeal filed First District Court of Appeal, Tallahassee

(b) Date appeal filed March 29, 2002

(c) Result Per Curiam Affirmed

(d) Date of result Oct. 2, 2002
Motion for Rehearing Denied

14. State *concisely* every ground on which you claim you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

(Grounds omitted in printing)

15. Have you previously filed any petitions, applications, or motions with respect to your judgment and conviction in any federal court?
Yes ( ) No (X)

* * * * *

17. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (X)

* * * * *

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

* * * * *

I declare that under penalty of perjury that the foregoing is true and correct.

Executed on 1/7/03
Date

/s/ Patrick Day
Signature

Signature of Attorney (If Any)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/LAC/MCR

JAMES V. CROSBY, JR.,[1]
Respondent.

ORDER

Petitioner has filed an application for writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1). The petition is in proper form, and the appropriate filing fee has been paid. Respondent should be given the opportunity to respond.

The response "shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding." Rule 5, Rules Governing Section 2254 Cases. If it is the State's contention that Petitioner's claims have not been exhausted in the state courts or that they are procedurally barred from review in the state courts, the response should set forth what state court remedies are appropriate with respect to each claim raised, and whether those remedies are still available to Petitioner. If these defenses are not raised in the response, they will be considered waived.

Accordingly, it is ORDERED:

---

[1] Since the filing of this action, James V. Crosby, Jr. has been appointed Secretary of Department of Corrections and therefore is substituted as the Respondent.

1. The clerk of this court is directed to furnish copies of the petition (to include any attachments to said petition) and this order to the Respondent and the Attorney General of the State of Florida, who shall have 45 days from the date this order is entered on the docket in which to show cause, if any, why the relief requested should not be granted.

DONE AND ORDERED this 4th day of February, 2003.

/s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

(Title omitted in printing)

ANSWER TO PETITION FOR HABEAS CORPUS

Pursuant to the court's order of February 4, 2003, Respondent Crosby, Secretary of the Florida Department of Corrections,[2] answers Day's petition for habeas corpus. Respondent asserts that Day is in the lawful custody of the State of Florida, and his petition should be denied.

I. Procedural History

Trial Court Proceedings, Adjudication and Sentencing

Tried by jury for premeditated murder, Day was convicted for the lesser included offense of second degree murder. (Ex. A-3). He was sentenced to 55 years (Ex. B), an upward departure based on his "elaborate cover-up," and escalation from non-violent to violent crime. (Ex. C). He is still in custody.

Direct Appeal

Day took a direct appeal of right to the First District Court of Appeal (First DCA). He raised only one issue: essentially, whether his departure sentence was proper or the two reasons given by the trial court. (Ex. D, p.4; Ex. F, p.2). The State answered in kind. (Ex. E, p.6).

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[2] After Day's habeas petition was filed, Michael Moore was succeeded as Secretary of the Fla. Dept. of Corrections by James V. Crosby, Jr. Mr. Crosby is being named pursuant to Fed.R.Civ.P. 25(d)(1) (automatic substitution of public officer who ceases to hold office).

The First DCA affirmed Day's sentence in a full opinion. (Ex. G). Day v. State, 746 So.2d 1220 (Fla. 1st DCA 1999). The mandate followed on January 6, 2000. (Ex. H). Day did not seek further review by the Florida or U.S. Supreme Court. (habeas pet., p.3).

Postconviction Relief

Day moved for postconviction relief under Fla.R.Crim.P. 3.850. (Ex. I). That motion raised five claims of ineffective trial counsel. (*Id.*, p.4-6).[3] It was summarily denied. (Ex. J., *with* attachments thereto). Day submitted an amended motion for postconviction relief raising a sixth claim of ineffectiveness. (Ex. K, p.170). As amended, the motion was again denied summarily. (Ex. L, *with* attachments thereto).

On appeal, Day submitted a handwritten brief to the First DCA. (Ex. M). The State, relying on specific provisions of Florida's appellate rules, declined to answer. (Ex. N). The First DCA affirmed, per curiam and without opinion. (Ex. O). Day v. State, 833 So.2d 122 (Fla. 1st DCS 2002) (table). The mandate issued on December 3, 2002. (Ex. P).

Day's habeas petition bears a prison-stamp indicating it was submitted to prison officials on January 8, 2003. Based on these events, Respondent agrees the petition is timely; filed after 352 days of untolled time.

II. Argument

(Argument omitted in printing)

III. Conclusion

Day's habeas petition should be denied.

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[3] Cited pages are those stamped at the bottom center.

CERTIFICATE OF SERVICE

I certify a copy of this ANSWER TO PETITION FOR HABEAS CORPUS has been sent by U.S. mail to **PATRICK A. DAY**, *pro se*, DOC# P03864, Gulf Correctional Institution, 500 Ike Steele Road, Wewahitchka, Florida 32465; on March 17th, 2003.

Respectfully submitted,

CHARLIE CRIST
ATTORNEY GENERAL

/s/ Charlie McCoy
Charlie McCoy
Senior Asst. Attorney General
Florida Bar No. 333646
Office of the Attorney General
The Capitol, Suite P1-01
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 922-6674 (fax)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/LAC/MD

JAMES V. CROSBY, JR.,
Respondent.

ORDER TO SHOW CAUSE

Before the court is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (doc. 1). Respondent filed an answer (doc. 7), to which petitioner responded (doc. 9). From a review of the record, it appears the petition is untimely. The court will therefore require petitioner to show cause why his petition should be not dismissed.[1]

BACKGROUND

In 1997, petitioner was charged with first-degree premeditated murder with a weapon in the Escambia County Circuit Court, case number 97-4411. (Doc. 7, Ex. A-3).[2] He was found guilty by jury verdict of second-degree murder, a lesser included offense. (*Id.*). On October 14, 1998, petitioner was adjudicated guilty of second-degree murder and sentenced to an upward departure sentence of 55 years incarceration. (Exs. B & C). On appeal of his conviction, petitioner challenged only his upward departure sentence

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[1] The district court has the discretion to raise *sua sponte* the timeliness of a state prisoner's habeas petition. *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002).

[2] Hereafter all references to exhibits will be to those attached to Doc. 7 unless otherwise noted.

(Ex. D). The Florida First District Court of Appeal ("First DCA") affirmed petitioner's sentence in a written opinion filed December 21, 1999. *Day v. State*, 746 So.2d 1219 (Fla. 1st DCA 1999) (Table) (copy at Ex. G).

PROCEDURAL HISTORY

On March 9, 2001 petitioner filed a motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised five grounds of ineffective assistance of trial counsel. (Ex. I). The trial court denied the motion in a written order dated February 26, 2002 (Ex. J). That same day, petitioner signed (and filed) an amended motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised the previous five grounds and one new ground of ineffective assistance. (Ex. K). The trial court construed the amended motion as a second motion under FLA.R.CRIM.P. 3.850 and, on March 13, 2002, denied relief on the merits (Ex. L, Order Denying Defendant's Second Motion For Post-conviction Relief). Petitioner filed a notice of appeal on March 15, 2002, in which he appealed "the denial of his Motion for Post Conviction relief rendered on February 26, 2002." (Ex. L, Notice of Appeal). The First DCA affirmed the denial order without written opinion on October 9, 2002. *Day v. State*, 833 So.2d 122 (Fla. 1st DCA 2002) (Table) (copy at Ex. O). The mandate issued on December 3, 2002. (Ex. P). Petitioner filed the instant federal habeas petition on January 8, 2002.[3] (Doc. 1).

DISCUSSION

Because Petitioner filed this § 2254 petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA gov-

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[3] Although petitioner signed his petition on January 7, 2003, (doc. 1, p. 17), the institutional stamp bearing petitioner's initials indicates that petitioner provided the petition to prison officials for mailing on January 8, 2003 (*id.*, p. 1).

erns the present petition. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Pursuant to 28 U.S.C. § 2244, a one-year period of limitation applies to the filing of a federal habeas corpus petition by a person in custody pursuant to a state court judgment. The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

§ 2244(d)(1). According to the tolling provision of § 2244(d), the time during which a "properly filed" application for state postconviction or other collateral review is pending shall not be counted toward any period of limitation. 28 U.S.C. § 2244(d)(2).

In the instant case, petitioner has not asserted that a government-created impediment to his filing existed, that he bases his claim on a right newly recognized by the Supreme Court, or that the facts supporting his claim could not have been discovered through the exercise of due diligence before the filing of this petition. Thus, the statute of limitations must be measured from the remaining trigger, which is the date on

which his conviction became final. *See* 28 U.S.C. § 2244(d)(1).

The First DCA affirmed petitioner's conviction on December 21, 1999. Petitioner did not seek review of his conviction in the Florida Supreme Court or in the United States Supreme Court. Thus, the one-year limitations period began to run 90 days after the First DCA's decision issued.[4] *Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002) (for purposes of § 2244(d)(1)(A), the one-year limitations period began to run when the time expired for filing a petition for certiorari with the United States Supreme Court); *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002); *accord Kaufman v. United States*, 282 F.3d 1336 (11th Cir. 2002) (applying same rule to motion filed under 28 U.S.C. § 2255). Accordingly, for purposes of § 2244 petitioner's conviction became final on March 20, 2000, and the § 2244 limitations period began to run.

Calculating the time period from March 20, 2000, 353 days elapsed before petitioner filed his first Rule 3.850 motion. This motion was pending from March 9, 2001 (the date it was filed) until December 3, 2002 (the date the First DCA issued the mandate on petitioner's appeal of the order denying relief).[5] The clock began to run once more on December 3, 2002, and expired 12 days later on December 16, 2002.[6]

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[4] The 90-day period for filing in the United States Supreme Court a petition for a writ of certiorari seeking review of a decision of a state appellate court runs from the date of the state court's opinion, no the date of issuance of the mandate. *See* SUP. CT. R. 13.3

[5] *See Nyland v. Moore*, 216 F.3d 1264 (11th Cir. 2000) (recognizing that a "properly filed" state postconviction petition is "pending" under Florida procedure – and consequently tolls the limitations period – until the appellate court's issuance of the mandate on appeal).

[6] December 15, 2002 was a Sunday. *See* FED.R.CIV.P. 6(a).

Petitioner did not file his federal habeas petition until January 8, 2003. Based on the foregoing, the habeas petition is untimely.

Accordingly, it is ORDERED:

Within twenty (20) days of the docketing order of this order, petitioner shall show cause why his federal habeas petition should not be dismissed as untimely.

At Pensacola, Florida this 11th day of December, 2003.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

(Title omitted in printing)

RESPONSE TO SHOW CAUSE ORDER

Petitioner shows that after an opinion from the State Appellate Court becomes final he has 90 days to file a Writ of Certiorari with the United States Supreme Court. Thus, Petitioner had 90 days from November 15, 2002 to file a Federal Habeas Corpus claim.

ARGUMENT

When the State issued a response to the Habeas Corpus claim, they agreed the Petition was timely (p. 3).

In any event the Judge writes that the claim was 23 days too late. The Judge previously assigned to this case took one year, long after the State's response and my reply, to tell me I was 23 days too late.

I

As written in Supreme Court Rules 13.3: The 90 day period for filing a petition for a writ of certiorari seeking review of a decision of a state appellate court runs from the date of the state court's opinion. That means every time after a state appellate court's decision the Petitioner has 90 days to file a writ to the U.S.S.C. Petitioner had 90 days after denial of the Motion for a rehearing by the state appellate court to file a writ of certiorari. Petition had 90 days after Nov. 15, 2002.

The opinion was filed on October 9 but that did not become final until disposition of Motion for Rehearing. That was November 15 (see attached). Thus, Petitioner's 90 days to file a writ seeking review of the Appellate court's affirmation of the 3.850 ineffective assistance claim started on Nov.

15, 2002. Petitioner's habeas corpus claim was timely filed on Jan. 8, 2003.

For the purposes of starting the clock on § 2255's one year limitation period, a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction. When the appellate court per curiam affirms Petitioner's appeal of the denial of the 3.850 motion it becomes, in effect, another affirmation of the conviction. Thus the Petitioner has 90 days to file a writ to the United States Supreme Court.

II

For 352 days the Petitioner sat in state custody demanding his trial transcripts which were being kept from him by Public Defenders who were passing it amongst themselves.

Long after the formal appeal was disposed of the Public Defenders, first Jamie Spivey and then another Public Defender kept the transcripts from the Defendant. Petitioner needed the trial transcripts for his ineffective claim and filed a complaint with the Florida Bar. No action was taken.

CONCLUSION

Petitioner's Habeas Corpus claim was timely filed on Jan. 8, 2003. Even the State agrees with this.

/s/ Patrick A. Day P03864
500 Ike Steele Rd.
Wewahitchka, FL 32465

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing response to show cause order has been furnished by regular U.S. mail to Charles McCoy, Attorney General State of Florida PL 01, The Capital, Tallahassee, FL 32399 on this date Dec. 29, 2003.

/s/ Patrick A. Day

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

(Title omitted in printing)

OBJECTION TO REPORT AND RECOMMENDATION

Petitioner received Report on January 12, 2004 and respectfully files this objection. Petitioner maintains State gave up the untimeliness argument when they stated Habeas petition was timely.

The Magistrate Judge in this case has filed the report and recommendation and asserts Petitioner was untimely in filing his petition. Rule 4 of 2254 cases clears this matter up.

ARGUMENT

After the Habeas Corpus petition was filed on January 8, 2003 the Magistrate Judge M. Casey Rogers sent an order to the state on the 4th of February 2003. The order said the petition is in "proper form" and ordered the state to reply. Rule 4 of 2254 cases shows: "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer . . . " This was the judge's time to dismiss Day's petition.

At the bottom of the order it states "If these defenses are not raised in the response, they will be considered waived."

On the 17th of March the Senior Assistant Attorney General filed an extensive answer to the petition containing many attachments. At the very beginning on p. 3 it states, "Based on these events, Respondent agrees the petition is timely."

In Judge Davis' Report and Recommendation Jackson v. Secretary is cited to show the district court has discretion to raise sua sponte the timeliness. That is true. But a distinction must be made here. This case from the 11th Circuit as well as cases from other circuits such as Hill v. Braxton (4th Cir.) and Herbst v. Cook (9th Cir.) deal with the judge dismissing before ordering the State to respond.

Hill states: "Our point is simply that when a federal habeas court, in its discretion, raises an affirmative defense before the state has even entered a responsive pleading, it acts consistently with Rule 4." The dispositive issue here is the proper interpretation and applicability of Rule 4 governing 2254 cases. Rule 4 authorizes the district court to sua sponte raise an affirmative defense in its preliminary consideration. However, here the district court raises the defense beyond its preliminary consideration. A footnote to Herbst states "... our holding today is not meant to suggest that a district court is required to raise the statute of limitations sua sponte, but merely that is has the authority to do so."

Scott v. Collins, 286 F.3d 923 (6th Cir. 2002) deals with this issue specifically. Scott argues that Rule 4 does not give a court continuing power to dismiss sua sponte the case after the court orders respondent to file an answer. In short, Rule 4 gives a district court the ability to dismiss habeas petitions sua sponte but that ability expires when the judge orders a respondent to file an answer or take other appropriate action. Thus the district court's sua sponte dismissal after it ordered respondent to answer and after respondent answered was ... an impermissible curing of the respondent's waiver.

In the instant case the respondent waived the statute of limitations defense. Therefore the district court's sua sponte action improperly cured respondent's waiver.

CONCLUSION

Petitioner should be given an evidentiary hearing based on grounds raised. Petition should be heard because timeliness issue is now no longer a consideration. The Respondent stated petition was timely.

/s/ Patrick A. Day P03864
Gulf C.I.
500 Ike Steele Rd.
Wewahitchka, FL 32465

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing objection to report and recommendation has been furnished by regular U.S. Mail to counsel for the defendant Charles Richey McCoy Attorney General State of FL PL01 The Capitol, Tallahassee FL 32399 on this date January 15, 2004.

/s/ Patrick A. Day

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10778

PATRICK DAY,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

ORDER:

Because appellant has satisfied the standard set forth by the United States Supreme Court in Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000), appellant's motion for certificate of appealability is GRANTED on the following issue only:

> Whether the district court erred in addressing the timeliness of appellant's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, after the appellee had conceded that appellant's petition was timely.

Appellant's motion for leave to proceed on appeal in forma pauperis is GRANTED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE